Office-Supreme Court, U.S.
FILED
JUL 26 1961
JAMES R. BROWNING, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 261

JOE BRADLEY SMITH, MYRON PARKER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

HARRY E. CLAIBORNE,
108 South Third Street,
Las Vegas, Nevada,
JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pennsylvania,
Attorneys for Petitioners.

PERNAU WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Page

Opinion below 1

Summary and short statement of matter involved 2

Basis of jurisdiction 2

Questions presented for review 3

Facts 4

Argument and reasons why writ should be granted 9

I.

Does Section 2113, Title 18, United States Code, in fact define and have reference to common law larceny, or has Congress defined and provided for a new and distinct offense? 9

(a) Under such section is trespass an essential element of the offense? 10

(b) Were the defendants entitled to have an instruction given to the jury defining trespass, as well as the other essential elements of common law larceny? 11

II.

May one be guilty of larceny where the evidence of the Government establishes that the owner of the property taken participates in the taking by actually handing the object of the larceny to the thief in order that the same might be taken, knowing full well that officers were standing by to apprehend the taker? 11

III.

May one be guilty of larceny where the evidence of the Government establishes that an employee of a bank, with knowledge of the bank, devised, planned and set up the method or means by which money of the bank could be given to the alleged thief solely for the purpose of apprehending and prosecuting such person? 12

Reasons for granting writ sought 16

Prayer 17

Table of Authorities Cited

Cases

	Pages
Connor v. People, 33 Pac. 159	14
Hunter v. U. S., 62 Fed. 2d 217	13
In re Greene, 52 Fed. 104	10
Levison v. U. S. (6th Circuit) 47 Fed. 2d 470	10
People v. Collins, 53 Cal. 185	13
People v. Werner (Cal.) 105 Pac. 2d 927	13
Prince v. U. S., 56 Fed. 2d 135	13
Prince v. U. S., 352 U. S. 322, 1 L.ed. 2d 370	9, 16
State v. Hull, 54 Pac. 159	14
State v. Lambert, 269 Pac. 848	14
Topolewski v. State (Wis.) 109 N.W. 1037-1041	13
U. S. v. Caroll, 105 U. S. 611, 26 L.ed. 1135	10
U. S. v. Coppersmith, 4 Fed. 198	10

Codes

United States Code, Section 2113, Title 18	2, 3, 9, 16
United States Code, Section 1254 (I), Title 28	2

Rules

Supreme Court Rules, Rule 19, Section I, (b)	2
Supreme Court Rules, Rule 29 (a)	7

Texts

52 C. J. S., Section I, page 779	10
52 C. J. S., Section 21a, page 814	11
52 C. J. S., Section 24, page 816	13

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Petitioners, Joe Bradley Smith and Myron Parker, respectfully show to this Honorable Court:

OPINION BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit, a copy of which is attached hereto, as the same has not yet been reported in any volume of the Federal Reporter, was rendered on the 29th day of May, 1961. A Petition for Rehearing was denied on the 30th day of June, 1961. There has not been a written opinion rendered upon the petition for

rehearing, hence there is nothing appended to the record or this petition with reference to the denial of the said petition for rehearing.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

By an indictment in the United States District Court for the District of Nevada, the petitioner, Joe Bradley Smith, was charged with violation of Section 2113, Title 18, United States Code, and the petitioner, Myron Parker, was charged in the same indictment with the violation of Section 2 of Section 2113, Title 18, United States Code. Upon trial a jury found each of the defendants guilty as charged in the indictment. A motion for a new trial was filed and overruled. The defendants were sentenced to imprisonment. Thereafter an appeal was taken to the United States Court of Appeals for the Ninth Circuit, which affirmed the judgment of the lower Court. The delay in the appeal was due to the fact that shortly after the trial of this action, the Court reporter was killed in an automobile accident, and it was necessary to have the shorthand notes transcribed in Washington, D. C.

BASIS OF JURISDICTION.

The jurisdiction of this Honorable Court is invoked under the provisions of Section 1254 (I) Title 28, United States Code, and pursuant to the provisions of Section I, (b) of Rule 19, Supreme Court Rules, in

that the United States District Court and the United States Court of Appeals has decided an important question of federal law, which apparently has not been, but should be, settled by this Court, or has decided such a question in a way in conflict with the applicable decisions of this Court.

QUESTIONS PRESENTED FOR REVIEW.

I. Does Section 2113, Title 18, United States Code, in fact define and have reference to common law larceny, or has Congress defined and provided for a new and distinct offense?

(a) Under such section is trespass an essential element of the offense?

(b) Were the defendants entitled to have an instruction given to the jury defining trespass, as well as the other essential elements of common law larceny?

II. May one be guilty of larceny where the evidence of the Government establishes that the owner of the property taken participates in the taking by actually handing the object of the larceny to the thief in order that the same might be taken, knowing full well that officers were standing by to apprehend the taker?

III. May one be guilty of larceny where the evidence of the Government establishes that an employee of a bank, with knowledge of the bank, devised, planned and set up the method or means by which

money of the bank could be given to the alleged thief solely for the purpose of apprehending and prosecuting such person?

FACTS.

On the 31st day of March, 1961, Myron Parker, one of the Petitioners, while driving his automobile in Las Vegas, Nevada, met one Gianotti, an employee of the Bank of Nevada of the same city. It appeared that Gianotti, Smith and Parker had previously been employed at a bank in Reno, Nevada, and all were known to each other for some period of time. It also appeared that the friendship between Gianotti and Parker had been a close one, and that Parker had been best man at Gianotti's wedding. At the time of the first meeting on the morning of the above date, according to the testimony of Gianotti, petitioner, Parker, got into Gianotti's automobile and after some conversation asked Gianotti, "How are chances to rob your window * * *". Gianotti said he thought it would be pretty good. Parker asked Gianotti how much would be in the cash drawer and Gianotti replied that he thought it would be between eighty and ninety thousand dollars. Parker told Gianotti that he wasn't coming in to rob the bank, but that another guy would, and that they would all meet at noon to talk over the matter some more.

Gianotti agreed to this arrangement; reported to work, and informed the bank manager what had taken place. He was advised by the bank manager to go

ahead with the plans and that the proper authorities would be notified. The Federal Bureau of Investigation and the Las Vegas Police Department were notified of the proposed plans. At the noon meeting Gianotti, Parker and Smith continued their discussion and finally agreed to the plan of operation suggested by Gianotti.

In order that no misunderstanding might exist as to this plan, we quote directly from the testimony of Gianotti, on page 47 as follows:

> "A. Well, I asked them how they were going to rob the bank, and they suggested—I suggested —that they come up to my window like the casinos do and get an exchange order. He then later suggested that he come up to my window and break a bill, and then I would hand him the package.
>
> Q. You asked them how they were going to rob the bank? Is that right?
>
> A. Yes.
>
> Q. What did they say in answer to that question?
>
> A. They said, 'Which way do you think would be the best way?'
>
> Q. Then you suggested a particular way or device? Is that right?
>
> A. Yes.
>
> Q. That is, presenting a check to you which you would cash?
>
> A. Right, like the casinos do."

And further, on page 48, he testified as follows:

> "Q. So that when you left them you understood that your participation in this thing was to be what?

A. Having the package ready for them to pick up when they came in."

After that conversation, Gianotti returned to the bank and advised the authorities of the plan. Arrangements were made for the proper protection of the bank. Shortly after two o'clock, one of the petitioners called Gianotti and advised that the other petitioner would be in within 15 or 20 minutes. Upon the arrival of the petitioner, Smith, at the bank, the following transpired. On page 25 of the transcript Gianotti testified as follows:

"Q. What happened then?

A. He moved up, handed me a hundred dollar bill and asked for change.

Q. What did you do?

A. I changed it. I gave him five twenties. As I was counting it out I said 'Wait here. I will be back with the package.'

* * * *

A. I walked back and got the sack and went and handed it to Brad.

Q. Exactly what did you do when you got back to your window and handed it to him?

A. Put it on the counter in front of him.

Q. Did you have any conversation with him at that time?

A. No.

Q. Did he say anything to you?

A. No.

Q. What did he do?

A. He put his hands on it, and then he was arrested.

Q. Now when you say he put his hands on the sack, what exactly do you mean?

A. Well, the sack is about that big, and it is tied at the top with a string. I handed the tied end through the open window. Smith put his hands on it and started to pull it toward him at the counter.

Q. What happened then?

A. That is when he was arrested by the agents."

Throughout his testimony Gianotti makes it clear that all of his actions were according to instructions that he had received from his superior. That at the time of the attempted taking of the money agents of the Federal Bureau of Investigation, the Chief of Police of the City of Las Vegas, the Chief of Detectives of the Las Vegas Police Department, and various other law enforcement officers, were present and in such a position that the petitioner, Smith, at no time had a chance to succeed in carrying out the plan to take the money. The petitioner, Smith, was unarmed. There appears some dispute in the testimony as to how far Smith moved the money toward him prior to his arrest.

At the trial of the cause before Honorable John R. Ross, United States District Judge for the District of Nevada, and a jury, the petitioners at the completion of the Government's case, moved for an order for acquittal under Rule 29 (a) and upon the Court overruling such motion, proceeded with the testimony. At the conclusion of all the testimony petitioners renewed their motion for an order of acquittal, which was denied by the Court. The Court proceeded to instruct the jury, and among other instructions,

gave Instruction No. 6A wherein it stated that the indictment charged the crime of bank robbery, and that bank robbery included larceny and also included asportation, an element of larceny. That the degree of taking was immaterial, the least removing of the thing taken from the place it was before, with intent to steal, was sufficient. That in law the word "asportation" means the taking or carrying away of property out of, and from the possession of the owner. That the least removing of the thing from the place where it is, with intent to steal it, is sufficient "asportation" or taking, and a temporary possession, however limited, is sufficient. This was as far as the Court would define the charge against the petitioners. The petitioners offered Instructions 1 through 6 and the Court refused the same. The instructions, both those given and those refused, may be found in the appendix.

By offering Instructions 2 and 5, the petitioners sought to have the Court include the element of trespass as an element of the crime of larceny. This was refused. Instructions 1, 3, 4, and 6 dealt with the conduct of the bank and its employee in assisting the attempting carrying out of the plan. All of these instructions, those given and those refused, will be discussed under the title of "Argument".

ARGUMENT AND REASONS WHY THE WRIT SHOULD BE GRANTED.

I. As to the question whether or not Section 2113, Title 18, United States Code, in fact defines, and has reference to the offense of common law larceny, or did Congress, by enacting such section, mean to, and did defint and punish any new, separate and distinct offense?

In the case of *Prince v. U. S.*, 352 U.S. 322, 1 L.ed. 2d 370, this Honorable Court in no uncertain terms clearly decided that Section 2113, Title 18, United States Code, added two larceny provisions to the act with less serious consequences than that provided for violation of robbery, and that therefore the two larceny provisions were separate and distinct from the robbery provision. Since larceny was made a separate offense, surely none will seriously contend that Congress meant other than common law larceny. The applicable section reads:

> "Whoever takes and carries away, with intent to steal or purloin, any property or money or other thing of value exceeding $100.00 belonging to, or in the care, custody, control, management, or possession of any bank etc."

While the act says nothing relative to the consent of the owner, we are certain that the word "steal" implies such lack of consent. We therefore respectfully submit that under the decision of this Honorable Court that the crime of larceny, i.e. common law larceny is defined.

In the case of *Levinson v. U. S.* (6th Circuit) 47 Fed. 2d 470, the Court held that where Congress adopts or creates common law offenses, the Court in determining the true meaning and definition of such crime, if not clearly defined, may look to the common law.

Accord:

In re Greene, 52 Fed. 104;
U. S. v. Coppersmith, 4 Fed. 198;
U. S. v. Caroll, 105 U.S. 611, 26 L.ed. 1135.

A. Since, as above pointed out, such section refers to common law larceny, it would of necessity include all of the elements of that offense at common law.

> "Larceny is the taking and carrying away from any place at any time, of the personal property of another, without his consent, by a person not entitled to the possession thereof, feloniously, with intent to deprive the owner of his property permanently, and to convert it to the use of the taker or some person other than the owner."
>
> 52 *C. J. S.,* Section I, page 779.

1. The intent;
2. Trespass;
3 Taking and asportation;
4. Without consent;
5. Feloniously to deprive the owner of his property and convert it to his or somebody else's use.

We feel that the above is such basic law that we need spend no further time in discussing the above proposition.

B. As pointed out above, the Court below refused to give the petitioners' requested instruction as to the necessity of trespass to constitute larceny. We might also add that the Circuit Court of Appeals refused to decide the question as to whether or not trespass was an essential element of the crime charged here. We are at a loss to understand why the District Court gave an instruction that "asportation" was an essential element of larceny as punished in the section under consideration, and yet refused the instructions 2 and 5 dealing with trespass. Error of the most serious nature was thereby committed.

> "Since larceny * * * is a criminal trespass on the right of possession, trespass is an essential element of the offense and, accordingly in order to constitute the crime of larceny it is necessary that the taking should be against the will of the owner, or at least without his consent."
>
> 52 *C.J.S.*, Sec. 21, A, page 814.

It is respectfully submitted that by no sound theory of law can a Court justify the giving of an instruction relative to the law of larceny, which covered only one of the elements of such offense, and refuse to give other and further instructions, spelling out the other essential elements of such offense.

II. May one be guilty of larceny where the evidence of the government establishes that the owner of the property taken actively participates in the taking by actually handing the object of the larceny to the thief in order that the same might be taken, know-

ing full well that law enforcement officers were standing by to apprehend the taker?

We feel that under the facts of the case here presented that the above question, together with the question posed in the heading following, requires an answer in solving the problem presented by the facts of this case.

The transcript is replete with testimony establishing the fact that not only the manager of the bank, but also the F.B.I. agents and the police authorities, knew and took an active part in setting up the plan to trap the defendants. That it was with the active consent and acquiescence of employees of the bank, that a sack containing a large amount of money was placed in a position where the same could be taken by the defendant, Smith. It is our contention, that where one consents to a taking the crime of larceny cannot be committed. That the evidence here establishes that not only the authorities, but also the bank officials did far more than merely permitting the defendants to attempt to carry out an unlawful act, and did in fact encourage and abet the defendants in a course of conduct which the Government now claims is a violation of law.

Under such facts we submit the following principles of law are applicable.

> "If an owner consents to the taking of his goods it is not larceny, applies although the consent is given solely for the purpose of apprehending the taker or the commission of the act * * * for it has ben said, 'the object of the law is to prevent larceny by punishing it, not to procure the com-

mission of larceny that the offender may be punished."

52 *C. J. S.* Section 24, page 816.

Nowhere have we found a better statement of the rule than the opinion of the Court in the case of *People v. Werner.* Cal. 105 Pac. 2d 927, at page 932 viz:

"If I induce one to come and take my property and then place it before him to be taken, and he takes it with criminal intent, or if knowing that one intends to take my property, I deliver it to him and he takes it with such intent, the essential element of trespass involving non-consent requisite to a completed offense of larceny does not characterize the transaction, regardless of the fact that the moral turpitude involved is no less than it would be if such essential were present."

It might be noted that the above quotation is from the case of *Topolewski v. State,* Wis. 109 N.W. 1037, 1041.

"The line of distinction seems to be whether there has been an active, as dintinguished from a passive, inducement to the taking on the part of the person asked or his duly authorized agent, and where such active inducement can be shown no conviction can be had."

Prince v. U. S., 56 Fed. 2d 135;

Hunter v. U. S., 62 Fed. 2d 217;

People v. Collins, 53 Cal. 185.

"The owner cannot personally or by his duly authorized agent suggest to the accused a criminal design, and actively cooperate with, and as-

sist the accused in taking the goods, then such conduct amounts to consent to the taking, and a criminal quality of the act is ended."

Connor v. People, 33 Pac. 159;
State v. Hull, 54 Pac. 159;
State v. Lambert, 269 Pac. 848.

These petitioners were entitled to have the jury instructed on this vital principle of law. Petitioners' proposed instructions, and particularly proposed refused instructions 1, 2, 3, 4 and 5, did instruct the jury that they should take into consideration this basic and vital element in reaching a verdict. Hence by reason of the Court's refusal to instruct the jury on this vital issue the jury did not know or understand the distinction between active participation and passive participation, or as to what constituted trespass under the laws of larceny. The jury could not have known from the instructions of the Court that if the bank consented to giving the defendant the money in question, that the crime of larceny was not complete, and not committed. We urge that the jury could have, under the given facts, found, as the record amply shows, an active participation by the bank officials in this offense. The evidence in this case clearly shows that the money of this bank was in a vault, protected from any unlawful act on the part of the defendants by way of larceny, that is the petitioners could not have taken this money by larceny without it being removed from the vault as it was done, placed in a sack by agents of the bank under the direction of the F.B.I. agent, as the record shows, and de-

livered personally to these appellants. Was not the jury entitled to be instructed as to what effect the bank agents' conduct in this regard had upon the commission of this offense? Was it not the petitioner's constitutional rights to have these facts properly considered by the jury, under proper instruction? Surely, the petitioners had the right to have the jury instructed as to whether or not the participating facts and actions of all of the parties involved constituted any or all of the elements making up the crime of larceny. At least they had the right to have the jury advised as set forth in refused instructions 1 through 6.

Since the Circuit Court's decision was based partially upon a question of fact, that is the participation of the bank and its agents in the criminal acts constituting the commission of the offense, and in determining the question of trespass raised by petitioners, the writer urges then that these questions of fact necessary to the determination of this issue by this Honorable Court were also questions which should have been properly presented to the jury. An analysis of the instructions given by the Honorable trial Court shows that the Court not only failed, but in fact refused to instruct the jury upon this vital issue. Since the participation of the bank and its agents in the acts of alleged criminality was a proper basis for review it became increasingly more important to the freedom of these petitioners, that the said participation of the bank and its agents be presented to the jury for determination under, of course, appropriate and proper restraints and restrictions of the Court.

REASONS FOR GRANTING THE WRIT SOUGHT.

The record in this cause having clearly established that the Honorable Court not only failed to follow the decision of this Honorable Court in the case of *Prince v. U. S.*, 352 U.S. 322, 1 L. ed. 2d 370, but on the contrary, by its instruction No. 6-A construed Section 2113, Title 18, United States Code, as being aimed alone at robbery, and that larceny was simply included in the robbery provision and that consequently no definition of larceny was required. Although such a position is hardly tenable in view of the District Court's instruction relative to asportation, a serious and grave question is presented by this record, namely, since this Honorable Court has held that Section 2113, Title 18, United States Code, deals both with robbery and larceny, were not the petitioners entitled to have an instruction as to the elements of larceny?

Also, in view of the fact that the petitioners were indicted for larceny, and tried upon that theory does not the element of trespass become a question for the jury under proper instruction, and did not the Circuit Court of Appeals err in holding that such was not a question requiring its decision?

There is a further and also serious question here presented, and that is, to what extent may law enforcement officers participate in working out the details of an offense, and aid and abet one into committing such offense, and then seek to prosecute such offender? In conclusion, is it not the duty of all enforcement officers to seek to prevent crime rather than encourage the violation of law?

Wherefore, your petitioners pray, for the foregoing reasons, that a writ of certiorari may be issued out of, and under the seal of this Court to the United States Circuit Court of Appeals for the Ninth Circuit, to review its judgment and order by the Honorable Court, to the end that this Honorable Court will reverse the said judgment and order entered by the United States Circuit Court of Appeals for the Ninth Circuit, and for such other and further relief as to this Honorable Court shall seem meet, just and proper.

Dated, Las Vegas, Nevada,
July 19, 1961.

Respectfully submitted,

HARRY E. CLAIBORNE,
JACOB KOSSMAN,
Attorneys for Petitioners.

(Appendices Follow.)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Joe Bradley Smith and Myron Parker, Appellants, vs. United States of America, Appellee.	No. 17,198 May 31, 1961

Upon Appeal from the United States District Court for the District of Nevada

Before: Hamley and Merrill, Circuit Judges, and Walsh, District Judge

Merrill, Circuit Judge:

This appeal is taken from conviction of the crime commonly known as bank robbery, 18 U.S.C. § 2113(b).[1] It challenges the sufficiency of the evidence to establish two elements of the crime: (1) the taking and carrying away of property; (2) the victim's lack of consent to the taking.

[1] "Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both * * *."

The government's principal witness was a teller at the Bank of Nevada at Las Vegas, Nevada. He testified that he had known both appellants; that Parker had been a fellow employee at the Bank of Nevada and that he had known Smith when both of them had worked at a Reno bank. The evidence leading up to the theft, as he related it, was as follows:

On the morning of March 31, 1958, while he was driving to work, appellant Parker passed him in his automobile and signaled that he wished to talk with him. He stopped and Parker stopped behind him. Parker came over to the teller's car, got in and they talked:

> "He asked me how chances were to rob my window. * * * I said I thought it would be pretty good. He asked me how much would be in my cash drawer and I told him I thought between eighty and ninety thousand dollars. * * * He said he wasn't coming in to rob it but that another guy would and we would meet at noon to talk about it some more."

The teller agreed to that arrangement and then reported the matter to the bank manager. He was told to go ahead with the arrangements and that the proper authorities would be notified.

At the noon meeting appellant Smith was present. It was agreed that Smith would come to the teller's window and hand him a one hundred dollar bill to be changed. The teller then would hand Smith a bundle of money which he would have prepared in advance. About two o'clock Parker telephoned the teller and

advised that Smith would be in in about fifteen minutes. The teller reported to the manager and then took all the money in his cash drawer, $65,000, put it in a money bag and put the bag in a locked inner vault. Smith arrived, presented a one hundred dollar bill and asked for change. The teller gave him change and then walked back to the inner vault, about sixty or seventy feet from his window, unlocked it, got the bag, returned to his window and put the bag on the counter in front of Smith. Smith put his hands on the bag and started to pull it toward him. He moved the bag a distance of two or three inches according to the teller; four to six inches according to another witness. At that point he was placed under arrest.

Appellant contends under these facts that a taking and carrying away of property has not been shown. He asserts that the money bag was not, under these circumstances, taken from the possession of the teller into the possession of Smith and carried away by Smith.

This contention is without merit. "The degree of the taking is immaterial, the least removing of the thing taken from the place it was before with intent to steal it being sufficient." Rutkowski vs. United States, 6 Cir., 1945, 149 F.2d 481, 483. To the same effect are State vs. Nelson, 121 W. Va. 310, 3 S.E.2d 530; Davis vs. State, 41 Ariz. 12, 15 P.2d 242; Daugherty vs. State, 154 Neb. 376, 48 N.W.2d 76; State vs. Richards, 3 Utah 2d 368, 284 P.2d 691.

Appellants contend that since the bank submitted to and actively cooperated in the taking it has dem-

onstrated its consent to the taking and that the element of trespass (a taking without the consent of the owner), essential to common law larceny, is lacking.

The United States contends that while trespass is necessary to the common law crime of larceny it is not necessary to the statutory crime of which appellants have been convicted. This issue we need not decide.

The bank never consented to the taking in the trespass sense. Knowing of appellants' felonious intent, it simply smoothed the way for the commission of the crime in order that the criminal might be apprehended. It was under no duty to prevent the crime nor to place obstacles in the way of its commission. We are not faced with any question of appellants' having been enticed into the commission of a crime. The scheme originated with them. The bank merely submitted to it. Any active participation was in complete accord with the plan and intent of appellants.

Appellants place reliance on cases which are readily distinguishable in that not only was possession voluntarily surrendered but the title or right to possession as well. Hite vs. United States, 10 Cir., 1948, 168 F.2d 973, was a Dyer Act case in which the defendant had fraudulently misrepresented as his own an automobile turned in on the purchase of a new car. It was held that this did not constitute a trespassory taking. The court followed and quoted from Loney vs. United States, 5 Cir., 1945, 151 F.2d 1, to the effect that in this type of case the victim "intends to and does part voluntarily with his title to the property as well as possession thereof not expecting the property to be

returned to him or to be disposed of in accordance with his directions." 151 F.2d 1, 4.

People vs. Werner, 1940, 16 Cal.2d 216, 105 P.2d 927, was a case in which money had voluntarily been delivered for the purpose, known to the victim, of being used by the taker to bribe a public officer. Again the right to possession had been freely granted although for a criminal purpose.

In the instant case no party to the transaction had any thought that the bank for any reason was granting to the appellants any right to possession of the money. We conclude that the taking constituted a trespass and was without consent of the bank.

Affirmed.

(Endorsed) Opinion Filed May 31, 1961.
Frank H. Schmid, Clerk.

United States Court of Appeals
for the Ninth District

No. 17198

Joe Bradley Smith, Myron Parker,
Appellants,

vs.

United States of America,
Appellee.

JUDGMENT

Appeal from the United States District Court for the District of Nevada.

This cause came on to be heard on the Transcript of Record from the United States District Court for the District of Nevada.

On consideration whereof, It is now ordered and adjudged by this Court, that the judgment of said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and Entered May 31, 1961
Frank H. Schmid, Clerk

Appendix B

Instruction No. 6

As we have just seen, the two statutes under which the defendants are being prosecuted are Sections 2113 and 2 of the United States Code.

Section 2113 reads in part as follows:

"(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association * * *"

shall be punished according to law.

Section 2 is as follows:

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

John R. Ross
United States District Judge

Instruction No. 6 A

The indictment in this case charges the defendants with the crime of bank robbery. Since robbery includes larceny it also includes asportation, an element of larceny. The degree of the taking is immaterial, the least removing of the thing taken from the place it was before, with intent to steal, is sufficient.

In law the word "asportation" means a taking or carrying away of property out of and from the possession of the owner. The least removing of a thing from the place where it is, with the intent to steal it, is a sufficient "asportation" or taking. And a temporary possession however limited in time is sufficient.

John R. Ross
United States District Judge

Instruction No. 1

If the owner or his agent cooperates with the taker in planning the scheme by which the taking is effected there is no larceny, but if the original plan was entirely that of the taker the cooperation of the agent of the owner in putting the plan into effect or facilitating its execution will not protect him hence, the act of the supposed accomplice in putting the goods where they can be taken by the intended thief, or in giving a signal for him to come for them, or in notifying him when the owner will be away from home, does not constitute a consent to the taking. Cooperation, however, must cease before the property is actually taken for, if it is taken by the supposed accomplice and handed to the intended thief, or if the supposed accomplice assists in taking it, there is no larceny.

Given:

.....

US Dist Jdge

Defendant's Offered Instructions No. 1 thru 6
Refused: John R. Ross /s/
U.S.D.J. (initials)

Filed
Nov 18 1959
Ray Mona Smith

Instruction No. 2

Trespass is an essential element of the criminal offense charged against these defendants, and accord-

ingly in order to constitute the crime of larceny it is necessary that the taking of the property be against the will of the owner, or at least without his consent, and there can be no trespass when the taking was with the consent or by the procurement of the owner.

Given:

.....

US Dist Jdge

Instruction No. 3

If the owner or his agent cooperates with the taker in planning the scheme by which the taking is effected there is no larceny, but if the original plan was entirely that of the taker the cooperation of the agent of the owner in putting the plan into effect or facilitating its execution will not protect him hence, the act of the supposed accomplice in putting the goods where they can be taken by the intended thief, or in giving a signal for him to come for them, or in notifying him when the owner will be away from home, does not constitute a consent to the taking. Cooperation, however, must cease before the property is actually taken for, if it is taken by the supposed accomplice and handed to the intended thief, or if the supposed accomplice assists in taking it, there is no larceny. Therefore, if you should find from the evidence that the Bank of Nevada, through its agents or employees, cooperated with the defendants in planning the scheme by which the property was taken, there is no larceny, and you should acquit.

Likewise, if you should find from the evidence that the cooperation by the bank's officers or employees with the defendants in carrying out their present scheme or design did not cease before the property was actually taken, and that said officers or employees did take said property and hand the same to the defendants, or either of them, then there is no larceny, for under those circumstances the owner of said property is considered under the law to have consented to the taking.

Given:

.....

USDJ

Instruction No. 4

If an owner consents to the taking of his property it is not larceny, even though the consent is given solely for the purpose of apprehending the taker in the commission of the act, or a third person in receiving the property after it has been taken, for the object of the law is to prevent larceny by punishing it, not to procure the commission of a larceny that the offender may be punished. This is especially true if the owner, through his agent, solicits the commission of the taking of which he complains.

Given:

.....

USDJ

Instruction No. 5

You are instructed that trespass is an essential element of the crime of larceny and as such is an essential element of the criminal offense laid in the indictment, and in order to convict the defendants you should find beyond a reasonable doubt that the taking of the property was against the will of the owner and without his consent.

Instruction No. 6

The law does not tolerate a person generating in the mind of a person who is innocent of any criminal purpose, the original intent to commit a crime thus entrapping such person into the commission of a crime which he would not have committed or even contemplated but for such inducement; and where a crime is committed as a consequence of such entrapment, no conviction may be had of the person so entrapped as his acts do not constitute a crime.

If the intent to commit the crime did not originate with the defendant and he was not carrying out his own criminal purpose. but the crime was suggested by another person acting with the purpose of entrapping and causing the arrest of the defendant, then the defendant is not criminally liable for the acts so committed.

Given:

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	4
Conclusion	6

CASES:

Mascuilo v. *United States*, 356 U.S. 386	6
Pelgis v. *Hanselmann*, 76 Cal. 440	5
Reg v. *Williams*, 1 Carr & K. 195, 1843	5
Samish v. *United States*, 223 F. 2d 358; certiorari denied, 350 U.S. 848	5
Sorrells v. *United States*, 287 U.S. 435	6
Bird v. *United States*, 187 U.S. 118	5

STATUTES:

18 U.S.C. 2113 b	2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 261

JOE BRADLEY SMITH and MYRON PARKER, *Petitioners*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 291 F. 2d 220.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1961. A petition for a rehearing was denied on June 30, 1961. The petition for a writ of certiorari was filed on July 26, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners were properly convicted of larceny of the property of a bank, although bank officials knew of the planned theft and permitted it to proceed to a point where one of the petitioners could be caught in the act of taking the bank's money.

STATUTE INVOLVED

Section 2113(b) of Title 18 of the United States Code provides in pertinent part:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years or both; * * *

STATEMENT

After a trial by jury in the United States District Court for the District of Nevada, petitioner Smith was convicted of taking and carrying away, with intent to steal or purloin, money belonging to a national bank of a value exceeding one hundred dollars, in violation of 18 U.S.C. 2113(b), *supra*. Petitioner Parker was convicted of aiding and abetting the commission of the offense. They were sentenced to imprisonment for five years and three years, respectively. The court of appeals affirmed. The evidence may be summarized as follows:

On the morning of March 31, 1958, Richard Gianotti, a teller at the Bank of Nevada at Las Vegas, was stopped on his way to work by petitioner Parker, a friend of his. After some casual conversation, Parker

asked Gianotti what the chances were for robbing his window at the bank. The reply was that the chances would be pretty good. Answering Parker's inquiry, Gianotti said that he would have between $80,000 and $90,000 at his window. Parker said that another man, whom he did not then identify, would come to the bank, and suggested that the three meet at noon to discuss the matter (Tr. 16-18, 34).

Gianotti reported this conversation to the branch manager as soon as he arrived at the bank and was told to go on about his duties (Tr. 19, 80). The manager notified the local office of the F. B. I., which in turn informed local officers. Arrangements were made for surveillance of the proposed noon meeting and for officers to be at the bank at the time of the anticipated robbery (Tr. 81, 85-87, 145).

Following the manager's instructions to cooperate Gianotti met with petitioners at noon. Petitioner Smith said that he would be the one to come to the bank. Gianotti suggested that he bring a sack, get an exchange order, and Gianotti would put the money in the sack. Smith rejected this plan. He said he would come in and ask for change for a $100 bill, and Gianotti should have the money ready and give it to him. Parker said he would call Gianotti before Smith came to the bank (Tr. 19-23).

In accordance with the manager's instructions, Gianotti got in touch with the F. B. I. and was told to "go along" with petitioners (Tr. 53-55). A little before two o'clock, Parker called Gianotti and said that Smith would be at the bank in about fifteen minutes (Tr. 23, 49-50). Gianotti put $65,000 in a large money bag and locked it in the inner vault (Tr. 24, 51). Smith then arrived and presented to Gianotti a

$100 bill for change. Gianotti told him to wait while he got the package, then stepped back to the vault, let it be known that this was the man, returned with the money bag, and put it on the counter in front of Smith. Smith placed his hands on the bag and moved it a short distance. Two officers then stepped forward and arrested him (Tr. 24-26, 56-65, 128-130, 136-139, 142-143). Immediately afterward, Parker, who was waiting outside in a parked car, was arrested (Tr. 159-160).

ARGUMENT

Petitioners contend that the crime defined by Section 2113(b) of Title 18, *supra*, p. 2, is limited to acts which would amount to common law larceny of the property of a federally-insured bank and argue that there was no common law larceny since the "consent" of the bank officials precluded the element of trespass. The court of appeals found it unnecessary to decide whether the statute covers acts which would not amount to larceny at common law for it found that the taking here did constitute common law larceny. In our view, this case presents no problem of determining whether the statute goes beyond the common law. The section requires that there be a taking and carrying away, and the critical question, both under the statute and at common law, is whether the acts of the bank officials amounted to such consent that as a matter of law there could be no *felonious taking* of the bank's property.

The court of appeals properly ruled that the bank officials did not consent to the taking. The officials merely instructed Gianotti to "go along" with petitioners' scheme so that intent to steal could be established by petitioners' own acts. The petitioners not only

originated the criminal design but planned the details of its execution; the bank played no part in the plan. The facts of this case are substantially similar to those in the leading English case of *Reg.* v. *Williams*, 1 Carr. & K. 195 (1843), where a publican directed his servant, who had been approached by the defendant, to get in touch with the defendant and to leave marked money on the counter where the defendant could apprehend it. It was held that the defendant's taking of the money amounted to larceny. As was said in *People* v. *Hanselman*, 76 Cal. 460; 462-463, there is no such consent by the owner as will bar prosecution for larceny "where there is mere passive submission on the part of the owner of the goods taken, and no indication that he wishes them taken, and no knowledge by the taker that the owner wishes them taken, and no mutual understanding between the two and no active measures of inducement employed for the purpose of leading into temptation, and no preconcert whatever between the thief and the owner."

Since there were no facts shown at the trial which could amount to consent on the part of the bank, there was no need to give the defendants' requested instructions on that issue. See *Bird* v. *United States*, 187 U.S. 118, 132; *Samish* v. *United States*, 223 F. 2d 358 (C.A. 9), certiorari denied, 350 U.S. 848. Moreover, the proffered instructions (Pet. App. ix-xii), insofar as they were refused by the judge, misstated the law relating to consent—going far beyond the proper boundaries of that doctrine.

There was no improper action, either by the bank officials or the law enforcement agencies, in permitting

the scheme which originated in the minds of the defendants to proceed to the point at which the criminals could be apprehended and convicted. Cf. *Sorrells* v. *United States*, 287 U.S. 435; *Masciale* v. *United States*, 356 U.S. 386. The trial court gave proper instructions on entrapment (Tr. 275).

CONCLUSION

It is therefore respectively submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

SEPTEMBER 1961

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